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**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

In the Matter of:

DAVID BURNELL SMITH

MUR 04-0023  
04-0024

No. 05F-040023-CCE

**ADMINISTRATIVE  
LAW JUDGE DECISION**

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**HEARING:** June 22 and 23, 2005. The record closed on July 29, 2005.

**APPEARANCES:** Michael M. Ricard, Esq. represented Appellant David Burnell Smith. Assistant Attorneys General Diana L. Varela and Jessica Funkhouser represented the Arizona Citizens Clean Elections Commission.

**ADMINISTRATIVE LAW JUDGE:** Daniel G. Martin

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Arizona State Representative David Burnell Smith ("Mr. Smith") appealed a March 25, 2005 Order by the Arizona Citizens Clean Elections Commission (the "Commission") that found Mr. Smith to have violated Arizona Revised Statutes ("A.R.S.") §§ 16-941(A)(3), 16-941(A)(5) and 16-948(C), and which ordered Mr. Smith to forfeit his state office, to repay to the Citizens Clean Elections Fund the amount of \$34,625.09, and to pay to the Commission a civil penalty in the amount of \$10,000.00. Based on the evidence of record, and the written arguments of counsel, the Administrative Law Judge makes the following Findings of Fact, Conclusions of Law and Recommended Order.

**FINDINGS OF FACT**

1. In 2004, Mr. Smith was a Republican Party candidate for the Arizona House of Representatives, District 7. Mr. Smith initiated his candidacy on December 2, 2003 by filing a statement of organization with the Arizona Secretary of State (the "Secretary"). See Commission Exhibit 43.

2. Mr. Smith named himself as the chairman of his campaign committee, "Smith for 7" (the "Committee"). Stanley Walters ("Mr. Walters") served as the Committee's treasurer.

1           3.       On July 27, 2004, Mr. Smith submitted to the Secretary an Application for  
2 Certification as a Participating Candidate. See Commission Exhibit 46. The purpose of  
3 that application was to qualify Mr. Smith for public funding under the Citizens Clean  
4 Elections Act, A.R.S. § 16-940 *et seq.* (the "Act").

5           4.       Mr. Smith had run for public office on several prior occasions; however, he  
6 had never done so as a Clean Elections candidate.

7           5.       Under the Act, candidates who agree to abide by the statutes and rules  
8 applicable to public funding of election campaigns are entitled to receive public funds for  
9 their campaigns. The purpose of the Act, as stated in the Findings and Declarations, is

10                   to create a clean elections system that will improve the integrity of  
11                   Arizona state government by diminishing the influence of special-  
12                   interest money, will encourage citizen participation in the political  
13                   process, and will promote freedom of speech under the U.S. and  
14                   Arizona Constitutions. Campaigns will become more issue-oriented  
                    and less negative because there will be no need to challenge the  
                    sources of campaign money.

15 A.R.S. § 16-940(A).

16           6.       The Act is administered by the Commission, which is responsible for its  
17 enforcement. See A.R.S. § 16-955 *et seq.*

18           7.       The Act sets limits on the amount of funding that a candidate may receive.  
19 In Mr. Smith's case, those limits were as follows:

20                   a.       Mr. Smith was permitted to contribute to his campaign, and spend  
21                   during the exploratory and qualifying periods, \$550.00 in personal monies. See  
22                   A.R.S. § 16-945(B).<sup>1</sup> Mr. Smith contributed \$500.00 of his personal monies to  
23                   his campaign.

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28 <sup>1</sup>       The "exploratory period" is the period beginning on the day after a general election and ending  
29       the day before the start of the qualifying period. For the 2004 election cycle, the exploratory period  
30       covered the time period from November 6, 2002 through December 31, 2003. The "qualifying period" is  
      the period beginning on the first day of January of an election year and ending 75 days before the day of  
      the general election. For the 2004 election cycle, the qualifying period covered the time period from  
      January 1, 2004 through August 19, 2004.

1           b.       Mr. Smith was permitted to raise and spend, during the exploratory  
2 and qualifying periods, \$2,830.00 in early contributions. See A.R.S. § 16-945(A)  
3 and (B). Mr. Smith raised \$2,690.00. This amount, combined with Mr. Smith's  
4 \$500.00 contribution from his own funds, provided Mr. Smith with \$3,190.00 to  
5 spend on his campaign before the end of the qualifying period.

6           c.       Mr. Smith was entitled to receive public funds during the primary  
7 election period in the amount of \$11,320.00. See A.R.S. §§ 16-961(G)(1) and  
8 16-959.<sup>2</sup> In addition, because Mr. Smith was running for office in a one-party-  
9 dominant district, he was entitled, pursuant to A.R.S. § 16-952(D), to reallocate to  
10 the primary election period a portion of the funds to which he would have been  
11 entitled in the general election period in an amount equal to 50% of the original  
12 primary election spending limit (*i.e.*, \$5,660.00).

13           d.       Mr. Smith was further entitled to receive matching funds based on  
14 expenditures made by his opponents in the election who had opted not to receive  
15 public funds under the Act. See A.R.S. § 16-952(A), (B) and (C).

16       8.       On July 28, 2004, Mr. Smith submitted to the Secretary a Participating  
17 Candidate's Application to Receive Funds and Qualifying Contribution Report. See  
18 Commission Exhibit 47.

19       9.       Mr. Smith qualified to receive Clean Elections funding on August 10, 2004.  
20 See Commission Exhibit 50.

21       10.      On August 10, 2004, the Commission issued Mr. Smith's initial primary  
22 election funding in the amount of \$16,980.00. See Commission Exhibit 36.

23       11.      On August 17, 2004, the Commission issued primary matching funds to  
24 Mr. Smith in the amount of \$1,032.00. See Commission Exhibit 37.

25       12.      On August 25, 2004, the Commission issued primary matching funds to  
26 Mr. Smith in the amount of \$4,733.09. See Commission Exhibit 38.

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29 <sup>2</sup>       The "primary election period" is the nine week period ending on the day of the primary election.  
30 For the 2004 election cycle, the primary election period covered the period of time from July 6, 2004  
through September 7, 2004. There was an overlap of the qualifying and primary election periods  
between July 6, 2004 and August 19, 2004.

1           13. On August 31, 2004, the Commission issued primary matching funds to  
2 Mr. Smith in the amount of \$1,762.19. See Commission Exhibit 39.

3           14. Each of the payments issued by the Commission to Mr. Smith were made  
4 by checks made payable to Mr. Smith.

5           15. Summing Mr. Smith's initial primary election funding and the subsequent  
6 matching funds issued by the Commission, the Administrative Law Judge finds that Mr.  
7 Smith's adjusted primary election spending limit was \$24,507.28.

8           16. Mr. Smith maintained a bank account for his campaign into which all of the  
9 campaign receipts were deposited. Mr. Smith was the sole signatory on all of the  
10 checks that were drawn on that account. See Appellant Exhibit 2.

11           17. During the exploratory and qualifying periods, but prior to the primary  
12 election period (*i.e.*, prior to July 6, 2004), Mr. Smith made campaign expenditures in  
13 the amount of \$766.71. When this amount is deducted from the \$3,190.00 that Mr.  
14 Smith raised during the exploratory and qualifying periods, the difference yields an  
15 additional \$2,423.29 that Mr. Smith was able to (and did) spend during the overlap  
16 period between the qualifying and primary election periods.<sup>3</sup>

17           18. During his campaign, Mr. Smith retained the services of Constantin  
18 Querard ("Mr. Querard") for the preparation of campaign advertising materials (*e.g.*,  
19 mailers and palm cards). See Commission Exhibit 25, at DBS0670-75.

20           19. Mr. Querard designed Mr. Smith's campaign materials, and Mr. Smith  
21 approved such materials prior to their distribution.

22           20. Mr. Querard subcontracted with other vendors for the printing and mailing  
23 of Mr. Smith's campaign materials; Mr. Querard did not personally print or mail any of  
24 those materials. See Commission Exhibit 32.

25           21. Mr. Querard worked directly with Mr. Smith in the preparation of Mr.  
26 Smith's campaign materials, and did not deal with anyone else from Mr. Smith's  
27 campaign. See Commission Exhibit 20, at DBS0974 (50:11-19).

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28  
29 <sup>3</sup> Thus, the total amount that Mr. Smith could lawfully spend during the primary election period was  
30 \$26,930.57 (\$2,423.29 plus Mr. Smith's adjusted primary election spending limit of \$24,507.28).

1           22.     During the primary election period, Mr. Smith received invoices from Mr.  
2 Querard for his services rendered as follows:

3           a.     On August 14, 2004, Mr. Querard gave Mr. Smith an invoice dated  
4 August 14, 2004 in the amount of \$6,060.00. See Commission Exhibit 25, at  
5 DBS0670.

6           b.     On August 19, 2004, Mr. Querard gave Mr. Smith an invoice dated  
7 August 19, 2004 in the amount of \$1,530.00. See Commission Exhibit 25, at  
8 DBS0671.

9           c.     On August 24, 2004, Mr. Querard gave Mr. Smith an invoice dated  
10 August 24, 2004 in the amount of \$1,762.50. See Commission Exhibit 25, at  
11 DBS0672.

12           d.     On August 30, 2004, Mr. Querard gave Mr. Smith an invoice dated  
13 August 30, 2004 in the amount of \$2,261.25. See Commission Exhibit 25, at  
14 DBS0673.

15           e.     On August 31, 2004, Mr. Querard gave Mr. Smith an invoice dated  
16 August 31, 2004 in the amount of \$5,920.00. See Commission Exhibit 25, at  
17 DBS0674.

18           f.     On September 1, 2004, Mr. Querard gave Mr. Smith an invoice  
19 dated September 1, 2004 in the amount of \$245.00. See Commission Exhibit 25,  
20 at DBS0675.

21           23.     The sum of the foregoing invoices is \$17,778.75. All of Mr. Querard's  
22 invoices were directed to Mr. Smith, and Mr. Smith received such invoices from Mr.  
23 Querard on the same day that the invoices were dated. None of the invoices provide  
24 any detail as to the cost for printing or mailing, nor do any of the invoices disclose the  
25 names of the vendors that provided those services.

26           24.     In accordance with A.R.S. § 16-901(8), each of Mr. Querard's invoices  
27 constituted an "expenditure," as each meets the definition of "a contract, promise or  
28 agreement to make an expenditure . . ." Thus, Mr. Smith made expenditures to Mr.  
29 Querard during the primary election period in the total amount of \$17,778.75.  
30

1           25. In addition to the expenditures made to Mr. Querard, Mr. Smith made  
2 additional expenditures during the primary election period totaling \$15,190.51. See  
3 Commission Exhibit 21, at DBS0344-45.

4           26. The total of Mr. Smith's campaign expenditures during the primary election  
5 period, representing the sum of Mr. Smith's expenditures to Mr. Querard (\$17,778.75)  
6 and Mr. Smith's other expenditures (\$15,190.51), less the \$2,423.29 that Mr. Smith  
7 spent during the overlap period between the qualifying and primary election periods,  
8 was \$30,545.97.

9           27. During the course of the election cycle, Mr. Smith was required to file a  
10 number of campaign finance reports ("CFRs") with the Secretary. Among others, Mr.  
11 Smith was required to file the following CFRs: (a) the January 31 CFR; (b) the June 30  
12 CFR; (c) the Pre-Primary CFR; (d) the Post-Primary CFR; (e) the Pre-General CFR; and  
13 (f) the Post-General CFR.

14           28. The January 31 CFR covered the time period from November 26, 2002  
15 through December 31, 2003, and was required to be filed between January 1, 2004 and  
16 January 31, 2004. See Commission Exhibit 53. Mr. Smith filed his January 31 CFR on  
17 January 28, 2004. See *id.*

18           29. The June 30 CFR covered the time period from January 1, 2004 through  
19 May 31, 2004, and was required to be filed between June 1, 2004 and June 30, 2004.  
20 See Commission Exhibit 54. Mr. Smith filed his June 30 CFR on June 25, 2004. See  
21 *id.*

22           30. The Pre-Primary CFR covered the time period from June 1, 2004 through  
23 August 18, 2004, and was required to be filed between August 19, 2004 and August 26,  
24 2004. See Commission Exhibit 56. Mr. Smith filed his Pre-Primary CFR on August 24,  
25 2004. See *id.*

26           31. The Post-Primary CFR covered the time period from August 19, 2004  
27 through September 27, 2004, and was required to be filed between September 28, 2004  
28 and October 7, 2004. See Commission Exhibit 61. Mr. Smith filed his Post-Primary  
29 CFR (late) on October 11, 2004. See *id.*

1           32. The Pre-General CFR covered the time period from September 28, 2004  
2 through October 13, 2004, and was required to be filed between October 14, 2004 and  
3 October 21, 2004. See Commission Exhibit 63. Mr. Smith filed his Pre-General CFR  
4 on October 15, 2004. See *id.*

5           33. The Post-General CFR covered the time period from October 14, 2004  
6 through November 22, 2004, and was required to be filed between November 23, 2004  
7 and December 2, 2004. See Commission Exhibit 64. Mr. Smith filed his Post-General  
8 CFR on November 23, 2004. See *id.* In his Post-General CFR, Mr. Smith reported total  
9 campaign disbursements in the amount of \$34,625.09.

10          34. Mr. Smith filed a number of amended CFRs, as follows:

11           a. On June 30, 2004, Mr. Smith filed an amended June 30 CFR. See  
12 Commission Exhibit 55.

13           b. On August 26, 2004, Mr. Smith filed a 1<sup>st</sup> Amended Pre-Primary  
14 CFR. See Commission Exhibit 57.

15           c. On September 12, 2004, Mr. Smith filed a 2<sup>nd</sup> Amended Pre-  
16 Primary CFR. See Commission Exhibit 58.

17           d. On September 24, 2004, Mr. Smith filed a 3<sup>rd</sup> Amended Pre-  
18 Primary CFR. See Commission Exhibit 59.

19           e. On October 11, 2004, Mr. Smith filed a 4<sup>th</sup> Amended Pre-Primary  
20 CFR. See Commission Exhibit 60.<sup>4</sup>

21          35. In his 3<sup>rd</sup> Amended Pre-Primary CFR, Mr. Smith reported that he had  
22 made an expenditure of \$17,778.75 to Mr. Querard on August 9, 2004. Mr. Smith  
23 further reported that he had a negative balance of \$5,995.02 at the end of the reporting  
24 period. See Commission Exhibit 59.

25          36. The Administrative Law Judge finds Mr. Smith's disclosure of his  
26 expenditures to Mr. Querard on his 3<sup>rd</sup> Amended Pre-Primary CFR to be consistent with  
27 the sum of the invoices that Mr. Querard presented to Mr. Smith during the primary  
28 election period (see Finding of Fact Nos. 22 and 23, *supra*).

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29 <sup>4</sup> On June 16, 2005, one week prior to the hearing in this matter, Mr. Smith filed a new set of  
30 amended CFRs. See Appellant Exhibit 8. Those CFRs are addressed in Finding of Fact Nos. 83-87,  
*infra*.

1           37. None of Mr. Smith's CFRs disclosed the names or addresses of the  
2 vendors used by Mr. Querard to print and mail Mr. Smith's campaign materials.

3           38. Mr. Smith won the primary election, and subsequently was elected as a  
4 State Representative for District 7 in the general election.

5           39. In the general election, Mr. Smith's adjusted spending limit was  
6 \$11,320.00. Mr. Smith received those funds on September 8, 2004. See Commission  
7 Exhibit 40.

8           40. On September 23, 2004, the Commission received a written complaint  
9 against Mr. Smith from Thom Von Hapsburg ("Mr. Von Hapsburg"), one of Mr. Smith's  
10 Republican opponents in the primary election. See Commission Exhibit 1.

11           41. The complaint alleged that Mr. Smith had violated A.R.S. § 16-948(C),  
12 Arizona Administrative Code ("A.A.C.") R2-20-702 and R2-20-109 during the 2004  
13 election.

14           42. On September 23, 2004, the Commission sent Mr. Smith a copy of the  
15 complaint and afforded Mr. Smith an opportunity to provide a written response. See  
16 Commission Exhibit 3.

17           43. On September 24, 2004, the Commission received a copy of a letter from  
18 Mr. Walters, the treasurer for the Committee, to Mr. Smith. See Commission Exhibit 4.  
19 On instructions from Mr. Smith, Mr. Walters' letter was accepted as Mr. Smith's  
20 response to Mr. Von Hapsburg's complaint.

21           44. In his letter, Mr. Walters wrote to Mr. Smith that Mr. Smith "may well have  
22 overspent on [his] primary campaign," and that, based upon Mr. Walters' review of  
23 certain invoices, Mr. Smith was "materially over [his] limit." See Commission Exhibit 4.

24           45. In that same letter, Mr. Walters advised Mr. Smith that they "have no  
25 choice but to revise our last report to [the Commission]." See *id.*

26           46. On September 28, 2004, the Commission notified Mr. Smith that the  
27 matter of Mr. Von Hapsburg's complaint would be considered at the Commission's  
28 October 5, 2004 meeting. See Commission Exhibit 6.



1           47. On September 28, 2004, the Executive Director of the Commission (the  
2 “Executive Director”) provided to the Commission a Statement of Reasons of Executive  
3 Director (“Statement of Reasons”), recommending to the Commission that it find reason  
4 to believe that violations of the Act and Commission rules had occurred. See  
5 Commission Exhibit 7.

6           48. Specifically, the Executive Director found that “there [was] reason to  
7 believe that [Mr. Smith] violated A.R.S. § 16-948(C), which requires a participating  
8 candidate to ‘pay monies from a participating candidate’s campaign account directly to  
9 the person providing goods or services to the campaign and shall identify, on a report  
10 filed pursuant to article 1 of this chapter, the full name and address of the person and  
11 nature of the goods and services and compensation for which payment has been  
12 made.” See Commission Exhibit 7, at 1.

13           49. The Executive Director further found that there was reason to believe that  
14 Mr. Smith had exceeded his primary election spending limit in violation of A.R.S. § 16-  
15 941(A). See *id.*, at 2.

16           50. On September 29, 2004, the Commission received a complaint against  
17 Mr. Smith from Virgel Cain (“Mr. Cain”), one the Democratic candidates for State  
18 Representative in District 7. See Commission Exhibit 8.

19           51. Mr. Cain’s complaint alleged that Mr. Smith had violated the Act by failing  
20 to report expenditures made on his campaign finance reports, by having a negative  
21 balance in his campaign account, by failing to include required information for  
22 contributors, by making expenditures prior to receiving his Clean Elections funding, and  
23 by failing to pay vendors directly for goods and/or services provided to his campaign.  
24 See *id.*

25           52. On September 29, 2004, the Commission sent Mr. Smith a copy of Mr.  
26 Cain’s complaint and afforded Mr. Smith an opportunity to provide a written response.  
27 See Commission Exhibit 9.

28           53. Mr. Smith filed a response to Mr. Cain’s complaint on October 12, 2004.  
29 See Commission Exhibit 17.  
30

1           54. The Commission met on October 5, 2004. At that meeting, the  
2 Commission accepted the Executive Director's recommendations and found reason to  
3 believe, pursuant to A.A.C. R2-20-208(A), that violations of the Act and Commission  
4 rules, as set forth by the Executive Director, had occurred.

5           55. On October 5, 2004, the Commission sent Mr. Smith an Order Requiring  
6 Compliance (the "Compliance Order"). See Commission Exhibit 12.

7           56. The Compliance Order required Mr. Smith to comply with A.R.S. § 16-  
8 948(C), A.R.S. § 16-941(A) and A.A.C. R2-20-104(D) within 14 days of the date of the  
9 order. The Compliance Order further instructed Mr. Smith that, during those 14 days,  
10 he could provide an explanation to the Commission, comply with the order, or enter into  
11 a public administrative settlement with the Commission.

12           57. On October 7, 2004, Mr. Smith submitted to the Commission a response  
13 to Mr. Walters' September 24, 2004 letter. See Commission Exhibit 14.

14           58. In his October 7, 2004 letter, Mr. Smith made the following statements:

15               a. His campaign "over spent the Clean Elections budget."

16               b. "There was no intent to over spend the budget; there was an  
17 error in how much money was left in the budget by Mr. Querard. When I  
18 first received the bills shortly after the election, it was my understanding  
19 that those bills had been paid. My accountant subsequently determined  
20 that some of those bills had not been paid and that there was an additional  
eight thousand dollars owed to Mr. Querard. Thus his letter and my  
contact with Clean Elections."

21               c. "I submitted the accountant's letter . . . to acknowledge an  
22 error was made."

23               d. "I was forthright in explaining that the campaign had made a  
24 mistake by over spending."

25 *See id.*

26           59. On October 8, 2004, the Commission received Mr. Smith's response to  
27 the Compliance Order. See Commission Exhibit 16. In that response, Mr. Smith  
28 admitted that his campaign committee "did over spend for the Primary," and further that  
29 "there is a balance of \$6,482.89 owed to Mr. Querard." See *id.*

1           60. As a result of its reason to believe finding, the Commission commenced  
2 an investigation into Mr. Smith's alleged violations of the Act.

3           61. In the course of its investigation, the Commission requested that an audit  
4 be performed on Mr. Smith's campaign account. See Commission Exhibit 19.

5           62. Sarvas, King & Coleman, a certified public accounting firm ("SK&C"),  
6 performed the audit of Mr. Smith's campaign account. On January 13, 2005, SK&C  
7 issued its investigative report (the "Investigative Report"). See Commission Exhibit 21.

8           63. In its Investigative Report, SK&C concluded that Mr. Smith had made  
9 expenditures in excess of applicable spending limits in violation of A.R.S. § 16-941(A),  
10 but that Mr. Smith had not violated 16-948(C) by failing to list the names and addresses  
11 of Mr. Querard's printing and mailing subcontractors on his CFRs. See *id.*

12           64. On January 24, 2005, the Commission sent Mr. Smith's attorney a Notice  
13 of Commission's Consideration re: Investigative Audit Report for Smith for 7, notifying  
14 Mr. Smith that the Investigative Report would be on the agenda for the Commission's  
15 meeting on January 27, 2005. See Commission Exhibit 22.

16           65. At its January 27, 2005 meeting, the Commission voted to approve the  
17 Investigative Report.

18           66. On January 27, 2005, the Commission voted to hire Gene Lemon ("Mr.  
19 Lemon") as an external investigative consultant after the Executive Director recused  
20 herself. Mr. Lemon is a retired corporate executive and corporate attorney, who from  
21 February 1999 to February 2004 served on the Commission. In his first, second, third  
22 and fifth years on the Commission, Mr. Lemon served as the Commission's  
23 chairperson.

24           67. On February 10, 2005, at the recommendation of Mr. Lemon, the  
25 Commission revised its approval of the Investigative Report to state that the  
26 Commission approved the Investigative Report "except for the second paragraph of  
27 page three which is incomplete as it omits the reporting requirement that reports must  
28 identify providers by name and address and identify the goods or services provided and  
29 their quantity and cost." See Commission Exhibit 24.  
30

1           68. Mr. Smith submitted a response to the Investigative Report on February  
2 21, 2005. See Commission Exhibit 25.

3           69. Upon completion of his investigation, Mr. Lemon prepared a Probable  
4 Cause Recommendation setting forth his position on the factual and legal issues of the  
5 case. See Commission Exhibit 26. Mr. Lemon concluded, among other things, that Mr.  
6 Smith had violated A.R.S. §§ 16-941(A) and 16-948(C), and recommended that the  
7 Commission enter an order requiring Mr. Smith to forfeit his office, requiring Mr. Smith  
8 to repay \$34,625.09 to the Citizens Clean Elections Fund (the "Fund"), and imposing on  
9 Mr. Smith a civil penalty in the amount of \$10,000.00. See *id.*

10           70. Mr. Lemon acknowledged in his Probable Cause Recommendation that  
11 Mr. Smith had been cooperative and forthcoming throughout the course of the  
12 investigation, and accepted Mr. Smith's contention that any violations he may have  
13 committed were unintentional. Mr. Lemon observed, however, that Mr. Smith's  
14 violations did not require intent, and that "the Act does not limit the Commission's  
15 enforcement actions to the imposition of penalties for intentional violations of the Act."  
16 See Commission Exhibit 26, at DBS0484.

17           71. On March 4, 2005, Mr. Lemon sent his Probable Cause Recommendation  
18 to Mr. Smith's attorney. See Commission Exhibit 26.

19           72. Mr. Smith was informed that, within 5 days from his receipt of Mr. Lemon's  
20 brief, he could respond by setting forth his position on the factual and legal issues of the  
21 case.

22           73. On March 14, 2005, the Commission received a written response from Mr.  
23 Smith's accountant to Mr. Lemon's Probable Cause Recommendation. See  
24 Commission Exhibit 28.

25           74. On March 14, 2005, Mr. Lemon met with Mr. Smith, Mr. Smith's attorney  
26 Lee Miller, Robert Hubbard ("Mr. Hubbard"), an accountant that Mr. Smith had hired to  
27 review his campaign account records, and Mr. Smith's current attorney Michael Ricard.

28           75. On March 21, 2005, Mr. Lemon issued a Probable Cause  
29 Recommendation Memorandum to the Commission, stating that he intended to proceed  
30 with his recommendation of March 4, 2005. See Commission Exhibit 28.

1           76. On March 21, 2005, Mr. Smith's attorney was notified that the Probable  
2 Cause Recommendation would be considered by the Commission at its March 24, 2005  
3 meeting. See Commission Exhibit 27.

4           77. On March 24, 2005, the Commission held its regularly scheduled monthly  
5 meeting, at which time the Commission found probable cause to believe that Mr. Smith  
6 had violated the Act and Commission rules.

7           78. On March 25, 2005, the Commission issued a written Order and Notice of  
8 Appealable Agency Action (the "Disciplinary Order") that found Mr. Smith to have  
9 violated A.R.S. §§ 16-941(A)(3), 16-941(A)(5) and 16-948(C), and which required Mr.  
10 Smith to: (1) forfeit his office of State Representative for District 7 pursuant to A.R.S. §  
11 16-942(C); (2) repay to the Fund the amount of \$34,625.09 pursuant to A.R.S. § 16-  
12 942(D); and (3) pay to the Commission a civil penalty in the amount of \$10,000.00  
13 pursuant to A.R.S. § 16-942(B). See Commission Exhibit 30.

14           79. The Disciplinary Order advised Mr. Smith that he was entitled to request  
15 an administrative hearing to contest the order and to request an informal settlement  
16 conference. See Commission Exhibit 31.

17           80. On April 21, 2005, after informal efforts to resolve the matter had proved  
18 unsuccessful, Mr. Smith requested an administrative hearing to contest the Disciplinary  
19 Order. See Commission Exhibit 34.

20           81. On April 27, 2005, the Commission issued a Notice of Hearing and  
21 Appointment of Administrative Law Judge, pursuant to which it referred Mr. Smith's  
22 request for hearing to the Arizona Office of Administrative Hearings. See Commission  
23 Exhibit 35.

24           82. The hearing convened on June 22 and 23, 2005.

25           83. On June 16, 2005, one week prior to the hearing, Mr. Smith filed a  
26 complete set of revised CFRs that had been prepared by Jeffrey Hill, an accountant  
27 who works in Tucson, Arizona. Mr. Hill is a former Arizona State Senator and is familiar  
28 with the Clean Elections system.

29           84. At hearing, Mr. Hill testified at length to his conclusions that Mr. Smith had  
30 not violated the Act as alleged by the Commission.

1           85. The Administrative Law Judge acknowledges Mr. Hill's credentials and  
2 experience; however, the Administrative Law Judge did not find Mr. Hill's opinions and  
3 conclusions to be persuasive.

4           86. The most significant deficiency in Mr. Hill's testimony was that it was  
5 based on a misunderstanding of the law regarding campaign expenditures. Specifically,  
6 in his re-creation of Mr. Smith's campaign finances, Mr. Hill ignored the dates of Mr.  
7 Querard's invoices to Mr. Smith, choosing instead to focus on dates of payment, which  
8 is not the applicable legal standard. Mr. Hill further demonstrated an apparently  
9 concerted effort to "re-shuffle" Mr. Smith's expenditures from the primary election period  
10 to the general election period, thus creating an appearance that Mr. Smith had not  
11 overspent his election spending limits during the primary election period. The most  
12 notable example of this re-shuffling involved Check No. 1045 to Mr. Querard in the  
13 amount of \$4,900.00 (see Appellant Exhibit 2), which is clearly dated September 3,  
14 2004 (*i.e.*, within the primary election period). The foregoing notwithstanding, Mr. Hill  
15 concluded, based on what the Administrative Law Judge finds to be a significantly  
16 strained interpretation of the evidence, that the check was actually written on  
17 September 16, 2004 (*i.e.*, within the general election period).

18           87. In view of the foregoing, the Administrative Law Judge did not afford any  
19 significant weight to Mr. Hill's testimony.

#### 20                           **CONCLUSIONS OF LAW**

21           1. In this administrative proceeding, the Commission bears the burden to  
22 prove, by a preponderance of the evidence, the violations of the Act alleged in the  
23 Disciplinary Order and the appropriateness of the penalties that have been imposed by  
24 the Commission. See A.R.S. § 41-1092.07(G)(3) and A.A.C. R2-19-119.

25           2. A preponderance of the evidence is "such proof as convinces the trier of  
26 fact that the contention is more probably true than not." Morris K. Udall, ARIZONA LAW OF  
27 EVIDENCE § 5 (1960).

28           3. The Administrative Law Judge addresses each of the Commission's  
29 allegations in turn.  
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4. A.R.S. § 16-941(A)(3) provides:

A. Notwithstanding any law to the contrary, a participating candidate:

\* \* \* \* \*

3. Shall not make expenditures in the primary election period in excess of the adjusted primary election spending limit.

5. The evidence presented at hearing demonstrated that in the 2004 primary election period, Mr. Smith's adjusted primary election spending limit was \$24,507.28, and Mr. Smith made expenditures in the amount of \$30,545.97. Thus, the Administrative Law Judge concludes that Mr. Smith overspent his adjusted primary election spending limit by \$6,038.69, and in so doing violated A.R.S. § 16-941(A)(3).

6. At hearing, Mr. Smith contended that he had not overspent his election spending limit because his bank account was never overdrawn. This contention is misplaced, as the relevant analysis focuses on expenditures within election periods, and not on the candidate's bank account.

A.R.S. § 16-948(C)

7. A.R.S. § 16-948(C) provides, in pertinent part:

The candidate or a person authorized under subsection B of this section shall pay monies from a participating candidate's campaign account directly to the person providing goods or services to the campaign and shall identify, on a report filed pursuant to article 1 of this chapter, the full name and street address of the person and the nature of the goods and services and compensation for which payment has been made.

8. The gravamen of the Commission's complaint with respect to A.R.S. § 16-948(C) is that Mr. Smith violated the above provision when he paid Mr. Querard for the printing and mailing of his campaign materials, and when he failed to identify, in his CFRs, the names and addresses of the persons who provided those services. The Administrative Law Judge agrees.

1           9.       Preliminarily, the Administrative Law Judge concludes that the purpose of  
2 A.R.S. § 16-948(C) is to provide the Commission with a mechanism by which it can  
3 make an informed determination as to whether the costs incurred by a candidate are  
4 commensurate with the products or services received, or whether a candidate is  
5 receiving improper campaign contributions in the form of free or discounted services or  
6 supplies.

7           10.     In the instant case, the evidence was undisputed that Mr. Querard did not  
8 personally provide printing and mailing services, and that Mr. Smith did not pay directly  
9 for those services. The evidence was further undisputed that Mr. Smith did not identify  
10 on his CFRs the names and addresses of the persons who provided those services, or  
11 provide any detail as to the payments received by those persons. The Administrative  
12 Law Judge concludes that such conduct violates A.R.S. § 16-948(C) because, in the  
13 absence of any detailed information as to the nature of the printing and mailing  
14 transactions, the Board was precluded from making an informed determination as to  
15 whether such services might constitute improper campaign contributions.

16           11.     Mr. Smith argued: “A review of § 16-948(C) . . . indicates that there is no  
17 requirement that the suppliers of a candidate’s vendor must be identified on the  
18 campaign finance reports.” Closing Memorandum, at 5-6. The Administrative Law  
19 Judge disagrees. If Mr. Smith’s reasoning was correct, a candidate could hire a vendor  
20 to manage every aspect of the candidate’s campaign, and pay that vendor the entire  
21 amount of the candidate’s election spending limit without the need for further disclosure.  
22 Such a result is not, in the Administrative Law Judge’s judgment, consistent with A.R.S.  
23 § 16-948(C)’s disclosure requirements

24           12.     Mr. Smith further urged that the disclosure requirements of A.R.S. § 16-  
25 948(C) present a slippery slope, as each supplier that provides goods or services to a  
26 campaign must, in turn, rely on additional suppliers. Mr. Smith asks, rhetorically, how a  
27 candidate can be expected to disclose all the suppliers in each such chain.

28           13.     The Administrative Law Judge agrees that at some point, the level of  
29 detail in a particular disclosure will outweigh the underlying purpose of the statute.  
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1 However, that point was not reached in the instant case. Given the magnitude of Mr.  
2 Smith's payments to Mr. Querard, many of which involved multiple thousands of dollars,  
3 the Commission had a legitimate interest in determining in more detail the manner in  
4 which those monies were spent.

5 14. Mr. Smith contended that he attempted to obtain the information regarding  
6 the printers and the mailing houses used by Mr. Querard, and that Mr. Querard refused  
7 to provide such information. The Administrative Law Judge finds no merit to this  
8 argument, as Mr. Smith's efforts in this regard were not commenced until February  
9 2005, *i.e.*, after the Commission had already commenced its investigation.<sup>5</sup>

10 A.R.S. § 16-941(A)(5)

11 15. A.R.S. § 16-941(A)(5) provides:

12 A. Notwithstanding any law to the contrary, a participating  
13 candidate:

14 \* \* \* \* \*

15 5. Shall comply with section 16-948 regarding campaign  
16 accounts and section 16-953 regarding returning unused monies to  
the citizens clean election fund described in this article.

17 16. The Administrative Law Judge concludes, based on Mr. Smith's  
18 demonstrated violation of A.R.S. § 16-948(C), that Mr. Smith failed to comply with  
19 section 16-948, and thereby violated A.R.S. § 16-941(A)(5).

20 A.R.S. § 16-942(B)

21 17. A.R.S. § 16-942(B) provides:

22 In addition to any other penalties imposed by law, the civil penalty  
23 for a violation by or on behalf of any candidate of any reporting  
24 requirement imposed by this chapter shall be one hundred dollars  
25 per day for candidates for the legislature and three hundred dollars  
26 per day for candidates for statewide office. The penalty imposed by  
27 this subsection shall be doubled if the amount not reported for a  
28 particular election cycle exceeds ten percent of the adjusted  
primary or general election spending limit. No penalty imposed  
pursuant to this subsection shall exceed twice the amount of

29 <sup>5</sup> In any event, a candidate cannot be allowed to "hide behind" his or her vendor's refusal to  
30 provide information. To recognize a vendor's refusal to provide information as a valid justification for  
failure to comply with A.R.S. § 16-948(C) would effectively eviscerate the statute.

1 expenditures or contributions not reported. The candidate and the  
2 candidate's campaign account shall be jointly and severally  
3 responsible for any penalty imposed pursuant to this subsection.

4 18. Under A.A.C. R2-20-222, "[a] civil penalty negotiated by the Commission  
5 or imposed by a court for a violation of the Act shall not exceed the greater of  
6 \$10,000.00 or an amount equal to any contribution or expenditure involved in the  
7 violation."

8 19. Based on the violations of the Act found herein, the Administrative Law  
9 Judge concludes that the Commission acted within its legal authority when it assessed  
10 the \$10,000.00 civil penalty against Mr. Smith.

11 A.R.S. § 16-942(C)

12 20. A.R.S. § 16-942(C) provides:

13 Any campaign finance report filed indicating a violation of section  
14 16-941, subsections A or B or section 16-941, subsection C,  
15 paragraph 1 involving an amount in excess of ten percent of the  
16 sum of the adjusted primary election spending limit and the  
17 adjusted general election spending limit for a particular candidate  
18 shall result in disqualification of a candidate or forfeiture of office.

19 21. As set forth in Finding of Fact Nos. 15 and 39, *supra*, Mr. Smith's adjusted  
20 primary election spending limit was \$24,507.28 and his adjusted general election  
21 spending limit was \$11,320.00. The sum of those spending limits is \$35,827.28; ten  
22 percent of that total is \$3,582.73. Thus, under A.R.S. § 16-942(C), Mr. Smith's office is  
23 subject to forfeiture if Mr. Smith's expenditures in the primary election period exceeded  
24 his adjusted primary election spending limit by more than \$3,582.73.

25 22. As the evidence demonstrated, Mr. Smith's expenditures in the primary  
26 election period exceeded his adjusted primary election spending limit by \$6,038.69, an  
27 amount significantly in excess of the \$3,582.73 limit.

28 23. Based on the foregoing, the Administrative Law Judge concludes that Mr.  
29 Smith is subject to the forfeiture provision of A.R.S. § 16-942(C).

30 24. In his Closing Memorandum, Mr. Smith argued, based on the June 2005  
CFRs prepared by Mr. Hill, that he "did not overspend in the campaign." Closing

Memorandum, at 10. The Administrative Law Judge finds no merit to this assertion, as Mr. Hill's revision of Mr. Smith's CFRs, and the opinions he expressed at hearing, failed to take into account the definition of "expenditure", and thereby failed to properly include all of Mr. Querard's invoices as expenditures within the primary election period.

25. Mr. Smith urged at hearing and in his post-hearing memoranda that in order to demonstrate a violation of A.R.S. § 16-941(A) sufficient to invoke the forfeiture provision of A.R.S. § 16-942(C), the Commission must demonstrate a violation of each of A.R.S. § 16-941(A)'s five subsections. The Administrative Law Judge disagrees.

26. A.R.S. § 16-941(A) provides, in its entirety:

A. Notwithstanding any law to the contrary, a participating candidate:

1. Shall not accept any contributions, other than a limited number of five-dollar qualifying contributions as specified in section 16-946 and early contributions as specified in section 16-945, except in the emergency situation specified in section 16-954, subsection F.

2. Shall not make expenditures of more than a total of five hundred dollars of the candidate's personal monies for a candidate for legislature or more than one thousand dollars for a candidate for statewide office.

3. Shall not make expenditures in the primary election period in excess of the adjusted primary election spending limit.

4. Shall not make expenditures in the general election period in excess of the adjusted general election spending limit.

5. Shall comply with section 16-948 regarding campaign accounts and section 16-953 regarding returning unused monies to the citizens clean election fund described in this article.

27. Mr. Smith's construction of A.R.S. § 16-942(C) as requiring a violation of each of the foregoing subsections does not withstand scrutiny for several reasons. First, under Mr. Smith's interpretation of the statute, a violation of A.R.S. § 16-941(A) could not be ascertained until after the general election, as a violation of subsection (A)(4) could not be established until after the filing of the Post-General CFR. Yet,

1 A.R.S. § 16-942(C) refers both to forfeiture of office and disqualification of a candidate.  
2 If Mr. Smith's interpretation was correct, the disqualification option could never occur,  
3 rendering that portion of the statute superfluous. Courts do not interpret statutes as  
4 containing useless provisions unless no other construction is possible. *City of Tucson*  
5 *v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, 553, 105 P.3d 1163, 1172 (2005). In this  
6 case, an alternate construction is possible, *i.e.*, that a violation of any provision of  
7 A.R.S. § 16-941(A) triggers the forfeiture provision of A.R.S. § 16-942(C).

8 28. Mr. Smith's argument fails for the further reason that A.R.S. § 16-942(C)  
9 allows that any CFR that indicates a violation of A.R.S. § 16-941(A) can trigger the  
10 forfeiture provision. Thus, the language of the statute contemplates that a violation can  
11 be determined to have occurred at multiple points over the course of an election cycle.  
12 Under Mr. Smith's interpretation of the statute, however, a violation of A.R.S. § 16-  
13 941(A) could not be ascertained until after the general election (*see supra*). The  
14 Administrative Law Judge concludes that in view of the statute's reference to "any"  
15 CFR, such a construction is not supported by the language of the statute.

16 29. Mr. Smith further urged that he is not subject to the forfeiture provision of  
17 A.R.S. § 16-942(C) because "A.R.S. § 16-942(C) requires that there be a campaign  
18 finance report filed indicating a violation of A.R.S. § 16-941(A) for a participating  
19 candidate such as Mr. Smith . . . [and the] operable campaign finance reports in this  
20 matter were prepared by accountant Jeff Hill and were filed in June 2005." Closing  
21 Memorandum, at 9.

22 30. Mr. Smith cites no legal authority, and the Administrative Law Judge is  
23 aware of none, that supports his proposition that the "operable" campaign finance  
24 reports were those that were filed in June 2005. To the contrary, the Administrative Law  
25 Judge concludes that in assessing the bona fides of Mr. Smith's campaign, the  
26 Commission was entitled to rely on Mr. Smith's previously-filed CFRs, which clearly  
27 indicated a violation of A.R.S. § 16-941(A). *See, e.g.*, Exhibit 59.

28 31. Considering the foregoing, and setting aside any constitutional issues that  
29 may be raised with respect to the validity of A.R.S. § 16-942(C), which the  
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1 Administrative Law Judge previously ruled at hearing he does not have jurisdiction to  
2 consider, the Administrative Law Judge concludes that A.R.S. § 16-942(C)  
3 unambiguously requires forfeiture of office in those cases where a candidate has  
4 exceeded the election spending limit in an amount in excess of ten percent of the sum  
5 of the adjusted primary election spending limit and the adjusted general election  
6 spending limit. The Administrative Law Judge agrees with the Commission that this  
7 remedy, although severe, is necessary to ensure compliance with the Act and to  
8 maintain the integrity of the Clean Elections system.

9 32. Based on the foregoing, and Mr. Smith's demonstrated violation of A.R.S.  
10 § 16-942(C), the Administrative Law Judge concludes that the Commission acted within  
11 its legal authority in ordering that Mr. Smith forfeit his office.

12 A.R.S. § 16-942(D)

13 33. A.R.S. § 16-942(D) provides: "Any participating candidate adjudged to  
14 have committed a knowing violation of section 16-941, subsection A or subsection C,  
15 paragraph 1 shall repay from the candidate's personal monies to the fund all monies  
16 expended from the candidate's campaign account and shall turn over the candidate's  
17 campaign account to the fund."

18 34. A.R.S. § 1-215(17) defines "knowing" as "import[ing] only a knowledge  
19 that the facts exist that bring the act or omission within the provisions of the statute  
20 using such word. It does not require any knowledge of the unlawfulness of the act or  
21 omission."

22 35. Applying the foregoing definition, the Administrative Law Judge concludes  
23 that the Commission need not demonstrate that Mr. Smith knew he was violating A.R.S.  
24 § 16-941(A); instead, the Commission must demonstrate only that Mr. Smith knew of  
25 the adjusted primary election spending limit, and that Mr. Smith knew of the  
26 expenditures that exceeded that spending limit.

27 36. The evidence demonstrated that Mr. Smith knew about his adjusted  
28 primary election spending limit, as each of the checks issued by the Commission were  
29 made payable to Mr. Smith. The evidence further demonstrated that Mr. Smith knew  
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1 about his expenditures during the primary election period, as (a) Mr. Smith maintained  
2 the campaign's bank account and was the sole signatory on all of the checks that were  
3 drawn on that account, and (b) Mr. Smith dealt directly with Mr. Querard in connection  
4 with Mr. Querard's creation of Mr. Smith's campaign materials.

5 37. Mr. Smith argues that he could not have knowingly overspent his  
6 campaign account because his campaign bank account was never overdrawn. The  
7 short answer to this contention is that the status of Mr. Smith's bank account is  
8 irrelevant to the determination of whether Mr. Smith knew of the adjusted primary  
9 election spending limit and the expenditures that exceeded that spending limit.

10 38. In view of the foregoing, the Administrative Law Judge concludes that Mr.  
11 Smith knowingly violated A.R.S. § 16-941(A), and that the Commission therefore acted  
12 within its legal authority under A.R.S. § 16-942(D) in ordering that Mr. Smith repay all of  
13 the monies expended from his campaign account. That amount, as reported in Mr.  
14 Smith's Post-General CFR (Commission Exhibit 64), was \$34,625.09.

#### 15 Other Arguments

16 39. The Administrative Law Judge has considered Mr. Smith's arguments,  
17 made both at hearing and in his closing memoranda, that he did not receive sufficient  
18 notice of the violations alleged by the Commission. Upon consideration of those  
19 arguments, the Administrative Law Judge affirms his ruling made at hearing that Mr.  
20 Smith received proper notice of the allegations, and that Mr. Smith's due process rights  
21 were not infringed.

22 40. Based on the foregoing, the Administrative Law Judge concludes that the  
23 Commission sustained its burden to prove the violations of the Act alleged in the  
24 Disciplinary Order and the appropriateness of the penalties imposed. Mr. Smith's  
25 appeal should be denied.  
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